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No. 93-

Supreme Court, U.S.
FILED
SEP 29 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

DAVID & ANN MARIE NIEMELA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DAVID W. NIEMELA
ANN MARIE NIEMELA
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Petitioning in their proper persons

QUESTION PRESENTED FOR REVIEW

CAN SUMMARY JUDGMENT BE PROPERLY GRANTED WHEN EACH PARTY IS RELYING ON A PRESUMPTION OF CORRECTNESS WHICH CONTRADICTS THE OTHER AND DISCOVERY IS STILL PENDING?

All parties to this proceeding are listed in the caption of the case.

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vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioners David and Ann Marie Niemela come before this Honorable Court and hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the First Circuit in case number 92-2192, entered on June 11, 1993.

REFERENCE TO OFFICIAL & UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

The opinion of the United States District Court for the District of Massachusetts is reprinted in Appendix A to this petition. The opinion of the United States Court of Appeals for the First Circuit is reprinted in Appendix B to this petition. The United States Court of Appeals for the First Circuit denial of the petition for rehearing is reprinted in Appendix C to this petition. Neither the District Court nor the Court of Appeals

decisions are reported.[1]

STATEMENT OF THE GROUND UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

i) Date of entry of judgment by the United States Court of Appeals for the First Circuit was June 11, 1993.[2]

ii) Plaintiffs timely filed a Petition for rehearing. On July 1, 1993, the United States Court of Appeals for the First Circuit ordered that the petition for rehearing be denied.[3] There were no requests for an order granting an extension of time within which to file the petition for a writ of certiorari.

iii) N/A

iv) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case is concerned with the proper application of Federal Rule of Procedure 56(f), which is reprinted in Appendix D.

STATEMENT OF THE CASE

Jurisdiction in the district court was provided by 28 U.S.C. § 1331 and 1340. The United States has waived sovereign immunity pursuant to 28 U.S.C. § 2410. Petitioners are persons who claim that the United States has wrongfully placed liens on their property, and thusly invoked the jurisdiction of the United States District Court for the District of Massachusetts for the purpose of quieting title to their property and removing the clouds created by the United States' liens. The record of the proceedings below reflect the following facts:

This Petition presents the unique question of whether or not it is appropriate to grant summary judgment when discovery has been sought

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[1]The parties shall be referred to as Plaintiffs (The Niemelas) and Defendant (The United States of America).

[2] *See* Appendix B.

[3] *See* Appendix C.

and is incomplete; and, if summary judgment can be granted when the parties are relying on presumptions of regularity in conflict with each other.

The Defendant alleges that the deficiencies were assessed on January 22, 1985, for tax year 1979. That a notice of assessment and demand for payment was generated by some division of the IRS on January 22, 1985 for the tax year 1979. There is no dispute that a notice of intention to levy pursuant to 26 U.S.C. §6331(d) was not sent for tax year 1979.

On November 12, 1986, the Internal Revenue Service issued a levy to North Middlesex Regional School District. In compliance with said levy, the School District, paid to the IRS monies belonging to the Plaintiff in the amount of $791.76. Said monies are the property of Plaintiff David Niemela, and not the Internal Revenue Service. This collection was made before any Notice of Intent to Levy had been mailed to the Plaintiff's.

On or about July 18, 1989, Plaintiffs requested the records of assessment pursuant to 26 U.S.C. §6103 and 26 C.F.R. 301.6203-1 and the Freedom of Information Act. In that request the Plaintiffs sought the following: a copy of the record of assessment, Accounting Assessment Journal, the Assessment list, form 23C, supporting documents and the ledger entry required to make an assessment; a copy of information available for the Plaintiffs in the system of records known as Subsidiary Accounting Files, D:R - Treasury/IRS 22.054 on the summary record of assessment RACS 006; a copy of the Assessment documents identified above for the following Assessment Dates: 7-7-80, 6-15-81, 1-22-85, 8-4-86, 8-18-87, 8-24-87, and 2-9-89 for the Plaintiffs. By response of August 8, 1989, by the Disclosure Officer of the Andover Service Center computer print outs were provided, but no supporting documents. To date Plaintiffs have has not received copies of the Accounting Assessment Journal, the Assessment List, or the Supporting Documents, any material which clearly sets forth the name of the taxpayer, the taxpayers identification number, the date of the assessment, the character of the liability assessed, the taxable period, and the amount assessed pursuant to 26 U.S.C. §6203 and 26 C.F.R. 301.6203-1.

August 8, 1989, the Andover Service Center Disclosure Officer provided computer printouts, but no supporting documents, such as an assessment list, assessment journal or any other material which clearly sets for the name of the Plaintiffs, their identifying numbers, the date of the assessment, the character of the liability assessed, the taxable period and the amount assessed pursuant to 26 U.S.C. § 6203 and 26 C.F.R. 301.6203-1. Since the Plaintiffs' Freedom of Information Act (Hereinafter FOIA) request was valid and responded to by the IRS, the

presumption arises that the Disclosure Officer properly performed the duties of his office and provided the Plaintiffs with the documents sought. *See, United States v. Chemical Foundation Inc.*, 272 U.S. 1 (1926).

Armed with the responses to the FOIA the Plaintiff's initiated their complaint against the United States on January 17, 1990, seeking to quiet title to property, 28 U.S.C. §2410; for unauthorized disclosure of return and return information, 26 U.S.C. § 7431; for failure to release an invalid lien, 26 U.S.C. §7432; and for unauthorized collection activity, 26 U.S.C. 7433. The Plaintiffs' alleged that due to procedural irregularities in the assessment process (essentially a complete failure to assess the alleged liabilities of the Plaintiffs), failure to send the notice of assessment and demand for payment pursuant to 26 U.S.C. §6303 and failure send the notice of intent to levy pursuant to 26 U.S.C. §6331 the liens of the United States were legally unenforceable and a nullity. On January 19, 1990, the Plaintiffs served the Defendant with their First Set of Request for Production of Documents.

March 8, 1990, the Defendant sought an extension of time to answer or otherwise respond to the Plaintiffs' First Set of Requests for Production of Documents. Plaintiffs opposed the motion for time on March 9, 1990. On July 25, 1990, the Defendant's extension was granted until the Motion to Dismiss or Summary Judgment has been ruled upon.

On March 22, 1990, the Defendant moved to dismiss the complaint or in the alternative for summary judgment. In support of the Motion for Summary Judgment the Defendant had created, for the purpose of this litigation, documents known as the Certificate of Assessments and Payments, or Form 4340. These documents are certified that the information contained in them is true and complete as disclosed by the records of the office of the signing individual as of the date of execution. The Forms 4340 at issue were signed by a supervisor of the certification unit. The forms purport to reflect: 1) alleged assessments were made against the Plaintiffs on January 22, 1985, for the tax year 1979; 2) substitute returns pursuant to 26 U.S.C. §6020(b) were prepared for the tax years 1980, 1981 and 1982; 3) assessments for the tax years 1980, and 1981 were allegedly made on February 9, 1989; 4) No assessment was made for tax year 1982; 5) something called a "first notice" was mailed (However, the forms do not reflect a mailing address nor the contents of the "first notice".).

The Defendant recognized in their Motion to Dismiss or in the Alternative for Summary Judgment that the forms 4340 were merely presumptive proof of a valid assessment pursuant to 26 U.S.C. §6203(a), citing *United States v. Chila*, 871 F.2d 1015 (11th Cir. 1989); *United*

States v. Dixon, 672 F.Supp. 503 (M.D. Ala. 1987). The use of the Form 4340 only arguably shifts the burden on to the Plaintiffs to come forward with evidence to rebut the presumptions which it contains.

The Plaintiffs responded to the Motion to Dismiss by filing an amended complaint (thereby abandoning certain issues)[4], filing a Motion to Defer Consideration of the Defendant's Motion to dismiss or in the Alternative for Summary Judgment Pursuant to Rule 56(f) and to Permit Discovery with supporting affidavits, Motion for Protective Order, Response in Opposition to Defendant's Motion to Dismiss, a Motion to Compel Answers to Plaintiffs' First Request for Production of Documents and a Reply to Defendant's request for sanctions.

In the Plaintiff's Verified Motion to Defer Consideration of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment Pursuant to Rule 56(f) and to Permit Discovery (hereafter Plaintiff's 56(f) Motion) they sought discovery in order to rebut Defendant's presumption of procedural regularity as to whether an assessment was recorded against them and whether a notice of assessment and demand for payment was issued/mailed, and whether a notice of intent to levy was mailed to their last known address. Division (f) of Rule 56 provides that when "it appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be had or may make such other order as is just." In *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) this Court pointed out the purpose of Rule 56(f) stating:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this case and numerous other cases where the Form 4340 has been

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[4]Other issues were addressed by the United States in their Motion to Dismiss or in the Alternative for Summary Judgment. However, the Plaintiffs' evaluated issues they had raised in their original complaint in light of the United States' Motion and determined to amend the complaint effectively abandoning issues the United States alleged as frivolous.

used there has been no discovery. Here the Plaintiffs attempted discovery two days after the filing of the complaint and made two motions to compel production of documents directly related to the issues of a procedurally proper assessment and the mailing of the required notices. The discovery motions were never acted upon by the trial court and the issue ignored by the appellate court.

Not wishing to be left with just the 56(f) deferral request the Plaintiffs also proffered the evidence already in their possession and acquired through the Freedom of Information Act and included the RACS 006 Summary Record of Assessment[5]; Assessment Certificate Form 23C[6]; Forms 4340 for 1979, 1980, 1981, and 1982 dated July 28, 1989[7]. None of these documents provides each of the necessary elements required in the assessment regulation. However, the RACS 006 and the Form 23C both contain certification statements that are substantially the same: "I certify that the taxes, penalty, and interest of the above classifications, hereby assessed, are specified in supporting records, subject to such corrections as subsequent inquiries and determinations in respect thereto may indicate to be proper."

On August 7, 1990, the Plaintiff's made their Second Motion to Compel Answers to the Plaintiff's First Request for Production. The United States had previously moved for and received an extension of time to respond to the Plaintiff's First Set of Request for Production. The Plaintiff's opposed the request for an extension and requested that the Trial Court compel the Defendants to Answer the Request for Production.

August 9, 1990, the Plaintiff's requested leave to file their reply to the Defendant's Motion for Sanctions Untimely. On the same day the

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[5]The RACS 006 does not contain any taxpayer identifying information and is only an aggregate of all assessments on a given day. There is no dispute that this document alone does not comply with the regulation at 26 C.F.R. 301.6203-1.

[6]The Form 23C, Assessment Certificate is also an aggregate form which does not reflect any identifying information concerning the Plaintiffs.

[7]These Forms 4340 do not reflect the all important "23C Date" which is alleged to be the date on which an assessment is made against the Plaintiffs. Just as the Forms 4340 produced by the Defendant dated February 8, 1990, the July 28, 1989 forms certify that they are true and complete and show all assessments penalties, interests, abatements, credits, refunds and advance or unidentified payment relating thereto as disclosed by the records of the Service Center as of the date of this certification.

Plaintiff's tendered their Reply to the Defendant's Motion for Sanctions.

On August 27, 1990, the Defendant Made a Motion for Protective Orders. Counsel for the Defendant sought protective relief on the grounds that the Plaintiff's were harassing him and attempting to delay the decision of the court.

On August 4, 1992, the Trial Court entered its Memorandum and Order granting summary judgment to the Defendant and denying the Defendant's motion for sanctions. On August 5, 1992, the District Court entered its Judgment. The Judgment granted Summary Judgment to the Defendant based in large part on the Certificate of Assessments and Payments, Form 4340. The Plaintiffs timely appealed and the District Court was affirmed on appeal.

ARGUMENT

The assessment process regarding federal income taxes is a matter controlled by statutes and regulations. In the 1954 Internal Revenue Code, Section 6201(a) authorized the Secretary of the Treasury to render assessment decisions. The method of recording such administrative adjudication is governed by Section 6203 which provides:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.

The specific tax regulation concerning the assessment process is 26 C.F.R. Section 301.6203-1, which reads in pertinent part:

> The district director and the director of the regional service center shall appoint one or more assessment officers.... The assessment shall be made by an assessment officer signing the summary record of the assessment. The summary record, ***through supporting records***, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and **in all other cases** the amount of the assessment shall be **the amount shown on the *supporting list or record***. [Emphasis added].

In Internal Revenue Manual 5312(1), MT 5300-31 (11-15-85), this assessment process is further clarified as follows:

(1) The assessment is made by an assessment officer

designated by the District Director or Service Center Director, as appropriate. The assessment officer signs a Form 23-C, Assessment Certificate, and this record, through supporting data, provides identification of the taxpayer by name and number, the taxable period, the nature of the tax and the amount assessed.

(3) The ***assessment lists support the assessment certificate***, which is used to summarize and record the official action of the assessment officer. [Emphasis added].

Importantly, the supporting list is something created contemporaneously at the time the assessment is made. A form 4340 is not a supporting document of the assessment! Thus, by the Services own admission in its IR Manual, "[t]he **assessment *lists* support** the assessment certificate...." This is a party admission pursuant to FRE 801(d)(2)(D) that an assessment list must exist. *U.S. v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989) (government manuals admissible as party admissions under FRE 801(d)(2)(D)). There can be no dispute that the assessment lists are the supporting records and absolutely essential before a valid assessment is made.

Precisely understanding the meaning of the assessment regulation will help make the evidentiary problem confronted here more distinct. It is the function of words to identify meanings, and it is the function of punctuation to package the meaning in usable clumps, like phrases, clauses, and sentences. Punctuation really says things, just as words do, and is essential when the meaning of a statute or regulation is at issue. The comma is a comparatively weak but subtle mark of punctuation.

Commas are used to enclose nonlimiting (also called "non-restrictive") phrases and clauses within a sentence. Though it may add information and help clarify meaning, a nonlimiting phrase or clause is not necessary to identify the word or words it modifies. It can be omitted from the sentence without changing the meaning. A limiting (also called "restrictive") phrase or clause, however, is necessary to identify the word or words it modifies. An integral part of the sentence, a limiting phrase or clause is ***not*** enclosed in commas.

The language and punctuation contained in Treas. Reg. 301.6201-1 is quite clear and free of misconstruction; "[t]he summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." The commas here enclose "through supporting records," and interrupts the free flow, or thought, of the sentence and can be omitted without changing the meaning of the

sentence.

In *Brewer v. U.S.*, 764 F.Supp. 309 (S.D.N.Y. 1991), the Court quoted the assessment regulation precisely this way at page 315:

> However, there is no indication in the record before us that the "Summary Report of Assessments", known as Form 23C, ***was completed and signed*** by the assessment officer as required by 26 C.F.R. [Section] 301.6203-1.
>
> This regulation provides, in relevant part, that "[t]he assessment shall be made by an assessment officer signing the summary record of assessment. The ***summary record ... shall provide*** identification of the taxpayer, [etc.]... The date of the assessment is the date the summary record is signed by an assessment officer." 26 C.F.R. Section 301.6203-1. The summary record is commonly known as Form 23C.

Id., n. 3 at 315.

The federal courts, professional commentators, and the IRS itself, interpret the assessment regulation exactly this way. An "assessment" is the recordation of the liability against a specifically identified individual as required under 26 C.F.R. 301.6203-1. The requirements of Treas. Reg. 301.6203-1 were recently stated by the Third Circuit in *Robinson v. United States*, 920 F.2d 1157 (3rd Cir. 1990), at page 1158 as follows:

> "A duly designated official for the district or regional tax center signs the summary record of the assessment, ***which identifies*** the taxpayers, the type of tax owed, the taxable period and the amount of the assessment. 26 U.S.C. 6203; Treas. Reg. 301.6203-1."

Planned Investments, Inc. v. U.S., 881 F.2d 340, 343 (6th Cir. 1989), also examined the requirements of Treas. Reg. 301.6203-1:

> Treasury regulations provide that the assessment be made by signing the summary record of assessment. 26 CFR [Section] 301.6203-1. The summary record, through supporting documents, must contain the following:
>
> 1) identification of the taxpayer;
> 2) character of liability assessed;
> 3) taxable period, if applicable; and
> 4) amount of assessment.

In *Christensen v. U.S.*, 90-1 U.S.T.C. 50,219 (D.C.N.J. 1990), the Court stated precisely how the assessment is recorded:

> "Treasury regulations provide that assessments are made by assessment officers signing the summary record of

assessment, ***which shows the identity of the taxpayer***, [etc.].
26 C.F.R. 301.6203-1.

Adam v. United States, No. 91-C-1335 (N.D.Ill., May 29, 1991), also determined how the assessment decision must be recorded:

> The **assessment *must be made* by an assessment officer *and include* the *name of the taxpayer*, the *nature of the assessed liability*, the *relevant tax period*, and the *amount of the assessment*.**
> 26 C.F.R. 301.6203-1 (1990).

In *Anderson v. United States*, 15 F.Supp. 216, 220 (Ct.Cl. 1936), the Court identified the assessment document submitted as evidence as an:

> [A]ssessment list on which there was listed an assessment of $100,443.08, personal income tax, and on the supplementary page attached to this assessment list the amount so assessed was listed as an addition tax for 1917 in respect of the income of "Anderson, Frank E., 1300 Classon Blvd., Oklahoma City, Okla."

The professional commentators on federal income taxation state that the "[a]ssessment of tax is the Service's official recognition and recording of a taxpayer's liability,"[8] and that the act of "assessment is ... the official act of ***recording on a list*** the liability of a taxpayer."[9] The actual, mechanical process of "***recording*** a taxpayer's tax liability" consists of an entry, on the "assessment list," of the identifying features. The assessment list is then incorporated as the written record supporting the summary record. The assessment list is part of the summary record. A variety of authorities describe this process as follows:

> [T]he admitted liability of the taxpayer is entered on an ***assessment list*** with his name, an identifying number, the taxable period, and the type of tax.
>
> On any date, the total tax liability of all taxpayers for each type of tax to be assessed on that day is summarized on Form 23-C, "Assessment Certificate." ...When signed by an assessment officer in the service center, it constitutes an

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[8]See 9 Review of Taxation of Individuals, 254, 262 (1985), "Remedies to Wrongful Seizures: An Analysis of the Determination, Notification, Demand and Levy Processes", by Miche and Horvitz.

[9]See IRS Practice and Procedure, section 14.06, p. 14-27 (1981), by Saltzman.

assessment for purposes of the Code.[10]

> The assessment is made when the appropriate official in the director's office ... ***signs a summary record sheet which contains the taxpayer's name***, [etc.].[11]

> An Assessment occurs when a Revenue Service assessment officer signs a summary record ***which is supported by a list that identifies the taxpayer***. . .. The assessment date is the day on which the summary record is signed.[12]

> Under the Code, the assessment is made by ***recording the taxpayer's name***, . . . and the date of assessment is the date the summary record is signed by an assessment officer.[13]

> After the returns have been checked and mechanical errors corrected, the tax is then ready to be entered on the ***assessment list*** *opposite the name of the taxpayer*. The total amount of tax due is entered in the debit column. ... After the amounts of tax indicated by the return and the amount paid upon the filing of the return ***have been entered for all of the taxpayers listed on the particular assessment list, the list is then signed by an appropriate official***...[14]

Indeed, from the assessment regulation, it is known that a "tax assessment" is the signing of the summary record which contains the identifying features. This is also the official interpretation of the IRS itself. When Lawrence B. Gibbs was the Assistant Commissioner (Technical), he requested a technical assistance memo from Meade Whitaker, Chief Counsel, for an interpretation of the applicable

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[10]IRS Practice and Procedure, section 14.06, p. 14-27 (1981), by Saltzman.

[11]34 Am.Jur.2d, "Federal Taxation," section 9122 (1986).

[12]Federal Tax Exam. Manual, section 12.4(a) (1986), by Mulroney.

[13]Internal Revenue Manual (CCH Vol. 89, p. 62, 017) section 5308 (1983)

[14]9 Mertens, Chapter 49A.28 (1987), at page 10

assessment statutes and regulations.[15] This request for Technical Assistance succinctly explained the Service's official interpretation of the assessment regulation:

> Code §6203 provides that an assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Treas. Reg. §301.6203-1 provides that the date of the assessment is the date the summary record of assessment is signed by an assessment officer.
>
> For the Service to assess any tax, or to credit or refund any overassessment, a summary ***assessment list*** or summary refund list, ***on which certain data concerning the taxpayer is required to be shown***, must be signed by an officer designated to do so.

The procedure for ***recording*** an assessment is the signing of "a summary assessment list ... ***on which certain data concerning the taxpayer is required to be shown***,...." This has consistently been held to be the case for decades.

The IRS has provided Plaintiffs with copies of RACS Report-006, which it contends replaced Forms 23C. These purported "Summary Record of Assessments", (whether RACS 006 or Form 23C) however, can be eliminated as the documents which comply with Section 6203 and its underlying regulation, since they do not contain the identifying features as required by law. This has been determined by the federal courts:

> Defendant submitted a "Form 23C" which it asserts is a summary record of assessment. Other than the assessment officer's signature, it does not contain any of the [Section] 6203 or [Section] 301.6203-1 requirements. It ***does not identify the taxpayer***, [etc.]. Defendant admits, "It is a summary of assessments made by one service center that have [been] posted to the Internal Revenue Service's main computer for one day. No individual assessment is shown on a 23C; it only shows totals for the service center for each class of tax." Therefore, unless the supporting records satisfy the statutory requirements, ***there is no evidence that the IRS made a valid assessment against Stallard***.

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[15]General Counsel Memorandum (GCM) 35988.

Stallard v. U.S., 806 F.Supp. 152, 158 (W.D.Tex. 1992).

In *U.S. v. Hesse*, 90-1 U.S.T.C. 50,049 (S.D.N.Y 1990), the Court came to the same conclusion as the *Stallard* Court:

> While 26 C.F.R. 301.6203-1 provides that the date of the assessment is the date the summary record is signed by an assessment officer, the summary record cannot on its own establish that an individual taxpayer was assessed on a particular date, for names of the individuals who were assessed appear nowhere on the document. ... Therefore, the summary record is ***neither primary nor secondary evidence*** of the date on which the assessment of the Hesses took place.
>
> At the time of the assessment and at least for some time thereafter, there existed additional documentation which established when the assessment of the Hesses took place. 26 C.F.R. 301.6203-1 provides that "the summary record, *through supporting records*, shall provide the identification of the taxpayer,... It is apparent from the testimony of Meyer that there existed documentation from the date when the Hesses were assessed that could clarify the matter in dispute before the Court.
>
> The certification of assessments and payments is secondary evidence of the date on which the assessment of the Hesses took place. ... Because the certificate of assessments and payments is derived from other documentation which indicated the date when the assessment took place, it is secondary evidence of that fact.
>
> *Hesse, supra,* 90-1 U.S.T.C. 83,173.

The assessment source documents which the Plaintiffs requested in their FOIA, which the government is attempting to conceal the fact that they don't exist, is the ***completed*** summary record containing the identifying features and signed by an assessment officer as required by 26 USC § 6203 and 26 CFR § 301.6203-1.

Pursuant to the provisions of the Freedom of Information Act, the government had three responses in the instant matter: (1) the summary record containing their name, etc., exists and was been produced (This did not occur.); (2) the summary record containing the Plaintiffs name, etc., exists but is exempt[16], or (3) the summary record which complies with the assessment regulation does not exist.

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[16]Defendants claimed **no** exemptions under the FOIA.

Form 4340, (Certificate of Assessments and Payments), is not a responsive document since, (1) it did not exist at the time of the Plaintiffs' FOIA request, and (2) it is secondary evidence of an assessment since it is derived from other documentation.

Herein lies the dilemma. The Plaintiffs made FOIA requests which would have caused the Disclosure Officer of the Service Center to provide the necessary assessments "supporting record" which would have set forth the identity of the Plaintiffs', the taxable period, the character of the liability and the amount of the liability. The Disclosure Officer did not provide such records, but instead had Forms created which lacked the requisite information. The Plaintiffs are entitled to the presumption that the Disclosure Officer did his job and produced what documentation concerning the Plaintiffs which was in existence. On the obverse of this coin is the Forms 4340 which were produced nearly a year later for the purpose of the litigation by the Defendant which were granted a presumption of correctness. In both instances the presumption is rebuttable. However the Plaintiffs could not rebut the presumption of the Defendants without access to discovery, as all of the necessary information was within the possession of the Defendant. This creates a material fact in dispute. It is also important to note that the Forms 4340 the United States submitted with its motion for summary judgment and the ones sent to Plaintiffs in response to their request were *not* in existence at the time the assessment was made, and therefore cannot be supporting documents.

Nevertheless, the District Court granted summary judgment in favor of the United States even though discovery disputes existed on these issues. Therefore, the District Court erred by failing to exercise its discretion by ruling on the Rule 56(f) motion, and granting summary judgment in favor of the government prior to Plaintiff's conducting and receiving relevant discovery.

First, the District Court failed to exercise its discretion by not considering the merits of Plaintiff's Rule 56(f) affidavit and motion. Therefore, since the District Court erred by failing to exercise its discretion, this case should be reversed and remanded to the District Court to determine the discovery disputes. *Garrett v. City and County of San Francisco*, 818 F.2d 1515 (9th Cir. 1987); *Patty Precision v. Brown & Sharpe Mfg. Co., Inc. v. U.S.*, 742 F.2d 1260, 1264-65 (10th Cir. 1984).

Second, under Rule 56(f) the adversary need not even present the proof creating the minimum doubt on the issue of fact which entitles him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting the proof by affidavit in opposition to the motion.

Fearing the slim chance that the Court could deny the Motion to Defer consideration, the Plaintiff's carefully provided a variety of reference information concerning problems with this included information from the General Accounting Office and periodicals and the IRS concerning: the IRS Computer problems; The notice process and error rates; The assessment process and problem assessments; The certificates of assessments and payments. This was done to establish that there were material facts in dispute with respect to the procedural violations the Plaintiff's predicated their complaint upon.

A major objective of Rule 56(f) has been to insure that a diligent party is given a reasonable opportunity to prepare his case. *Black Panther Party v. Smith*, 661 F.2d 1243 (9th Cir. 1981). In keeping with this philosophy, the granting of summary judgment will be held to be error when discovery is not yet completed. *Parrish v. Board of Com'rs of Alabama State Bar*, 533 F.2d at 951.[17]

Thus, the District Court's ruling is contrary to the law which was established in *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988), and *Parrish, supra*. In *WSB-TV v. Lee*, the Court examined three Supreme Court decisions on summary judgment and determined that their common denominator is the Court's caveat that summary judgment may only be decided upon an adequate record:

> In *Anderson [v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)], the Court held that Rule 56(e) provides that, "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" 106 S.Ct. at 2511. The Court underscored that:
>
> > This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.
>
> *Id.* at n. 5.
>
> In *Celotex [Corporation v. Catrett*, 477 U.S. 317 (1986)],

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[17] See also *Vega v. First Federal Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 926 (6th Cir. 1980), citing *Parrish v. Board of Commissioners*, 533 F.2d 942 (5th Cir. 1976).

> the Court held that "Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" but only "after adequate time for discovery." 106 S.Ct. at 2552-53. In concluding that the district court had properly granted summary judgment, the Court noted that "[t]he parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment." 106 S.Ct. at 2554. Recognizing that premature motions present a problem, the court concluded that the problem:
>
> > can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.
>
> 106 S.Ct. at 2554-55. In *Matsushita [Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574 (1986)], the Court considered it significant that the parties had conducted "several years of detailed discovery."

WSB-TV v. Lee, 843 F.2d at 1269.

Plaintiff's had attempted to engage the Defendant with discovery through requests for production of documents which the United States had in their exclusive possession. This discovery dispute was still unresolved when the District Court granted summary judgment in favor of the United States. The claims asserted by Plaintiffs presented numerous factual issues which should not have been decided by summary judgment prior to affording Plaintiffs an opportunity to prove their claims by conducting relevant discovery. This opportunity for discovery is even more critical in cases like the case at bar where the United States possesses all of the relevant information.[18] Only through discovery can it be determined whether a material factual issue exists which precludes summary judgment. In this case, the Plaintiffs were denied the opportunity to pursue relevant avenues of inquiry concerning their claims.

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[18]If facts are solely in the possession of the moving party, a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course. *Lunderstadt v. Colafella*, 885 F.2d 66 (3d Cir. 1989).

A review of *Brafman v. U.S.*, 384 F.2d 863, 866-68 (5th Cir. 1967) discloses the adoption of the necessity to literally interpret the treasury regulation at issue herein, 301.6203-1.

> When § 6203 of the Internal Revenue Code of 1954 was before Congress, the detailed discussions of the proposed section in both the House and Senate was substantially the same:
>
> > This section is a substantial clarification of existing law. It provides that the assessments shall be made by recording the liability of the taxpayer in accordance with rules or regulation of the Secretary. This will permit recording of liability, and hence assessment, through machine operations or through any other modern procedure. The Secretary is directed to furnish to the taxpayer,upon request a copy of the record of the assessment of that taxpayer's liability.
>
> It appears to us that the requirement of the applicable Treasury Regulation - that an assessment officer sign the assessment certificate - is consistent with the literally mechanical procedures for recording of liability. The recordation is to be accomplished through "machine operations", but the actual and final assessment step, that step which establishes a prima facie case of taxpayer liability, can be taken only with the approval of a responsible officer of the Internal Revenue Service.

Brafman, at 867. (Footnotes omitted.)

The *Capital University Law Review*, Vol 16:87, (Fall 1986) in the article *The I.R.S.'s Computer Generated Assessments and Notices - Are they Valid?* Discusses the decision in *Brafman*.

> In light of *Brafman*, the Court's holding in the recently decided case of *U.S. v. Berman*, is surprising. In *Berman*, the government offered a computer transcript of the taxpayer's I.R.S. account to prove that an assessment was made. Although the court recognized that the computer transcript was not an official I.R.S. form, the transcript was "highly probative evidence and suffice[d], absent contrary evidence, to establish that assessments were properly made." The court further held that "an agent's testimony established that a section 6203 assessment is an internal, mechanical bookkeeping task performed by the computer based on return information." In

doing so the court failed to consider the method by which assessments must be made as set forth in Treasury Regulation 301.6203 and decided the issue on evidentiary principles.

Clearly the *Brafman* court's approach was better reasoned. It is the government's burden to show that an assessment has been made. To require that the taxpayer "contradict the evidence of the internal records of the I.R.S. that a notation was made on [the computer] record" would place an ***insurmountable burden on the taxpayer while the government could prove a valid assessment merely by submitting a summary record signed by an assessment officer - a document prepared by the I.R.S. and in their control.***

Capital University Law Review, Vol 16:87, pgs 102-03. (Footnotes omitted.)(Emphasis added.)

Here there is no doubt that the Summary Record of Assessment contains no information to connect any individual taxpayer to the assessment certificate. There is no possible way to establish that the Plaintiffs' liability is contained within the assessment but for the supporting documents. Since the Plaintiffs' sought the supporting documents which would establish the assessment of liability as to them in their FOIA requests and no such documentation was provided they successfully rebutted the presumptions enjoyed by the Defendant.

Commissioner v. Shapiro, 424 U.S. 614, 96 S. Ct. 1062, 47 L.Ed.2d 278 (1976), is also supportive of the necessity to discover into the documents in the possession of the Defendant.

Respondent argues on the other hand that unless the government has some obligation to disclose the factual basis for its assessments, either in response to a discovery request or on direct order of the court, the exception to the Anti-Injunction Act provided in *Enochs v. Williams Packing Co.*, supra, is meaningless. The taxpayer can never know, unless the government tells him what the basis for the assessment is and thus can never show that the Government will certainly be unable to prevail. We Agree with Shapiro.

* * *

Williams Packing did not hold that the taxpayers burden of persuading the District Court that the Government will under no circumstances prevail must be accomplished without any disclosure of information by the Government. It says instead that the question will be resolved on the basis of the information available to the Government at the time of the suit.

> Since it is absolutely impossible to determine what information is available to the Government at the time of the suit unless the Government discloses such information in the District Court pursuant to appropriate procedures, it is obvious that the Court in *Williams Packing* intended some disclosure by the Government.
>
> *Shapiro, supra*, 626-628.

In the case of *Smaldone v. Kurtz*, et al., 41 AFTR 2D 78-773 at ¶78-457 (D.C.D.C. 1978) the trial court discussed the necessity of permitting discovery based on *Shapiro*, at 628 n.10., and permitted such discovery. There is no good basis to be served in a free society to deny its citizens the information possessed by the government, particularly in the important area of taxation. There is no reason not to have the Defendant produce the necessary supporting records the certificate of assessment says exist, and have twice or more certified are in existence.

It is well-established that the tax laws are technical in nature and are to be interpreted accordingly. See *Lewyt Corp. v. Commissioner*, 349 U.S. 237 (1955). An assessment was rendered wholly void where the IRS assessment officer simply failed to sign it, which the court ruled was a technical violation of 301.6203-1. See *Brafman, supra.* Here, the same principle should be applied where the supporting records which identify the taxpayer, the character of the assessment, the amount and taxable period are not annexed to the assessment certificate. The failure to identify the taxpayer through the supporting documents is no less an assessment deficiency than is the failure to sign the assessment certificate. The court in *Brafman* stated that "Treasury Regulations are binding on the Government as well as on the taxpayer..." and cited an earlier circuit court case in stating that "Tax officials and taxpayers alike are under the law, not above it." *Id.* at 866.

The Fifth Circuit court in *Brafman* also cited the following language from *United States v. Lehigh*, 201 F.Supp. 224, 234 (W.E.Ark. 1961), *appeal dism'd.* 305 F.2d 377 (8th Cir. 1962):

> "Any procedural defense is in a sense 'technical.' The procedures set forth in the Internal Revenue Code were prescribed for the protection of both Government and taxpayer. Neglect to comply with those procedures may entail consequences which the neglecting party must be prepared to face, whether such party be the taxpayer or the Government."

In *Lehigh*, the court invalidated an IRS assessment where both the notice sent to the taxpayer and the federal tax lien filed against him contained the wrong taxable period.

In *Rose v. U.S.*, 90-1 U.S.T.C. 50,282 (D.C.Mass. 1990), summary judgment was granted to the taxpayer because the IRS, in making the actual assessment, took an incorrect tax period from the proposed assessment. The court reasoned that noncompliance with the literal requirement of the regulation 301.6203-1, that the taxable period be identified in the summary record of assessment is fatal. See also *U.S. v. Grabsheid*, 82-1 U.S.T.C. 9382 (N.D. Ill. 1982); *Crocker v. U.S.*, 323 F.Supp 718, 723 (N.D.Miss. 1971); *Pfeiffer Co. v. U.S.*, 518 F.2d 124, 129 (8th Cir. 1975).

If *arguendo* the Plaintiffs conceded that the IRS Forms 4340 are admissible, they only met the government's initial burden of proof concerning the assessment. Courts however have clarified that it is presumptive evidence, and merely serves to shift the burden to the taxpayer to overcome this presumption of counter veiling proof. See *U.S. v. Dixon*, 672 F.Supp 503 (M.D.Ala. 1987); *U.S. v. Powell*, 494 F.Supp. 260, 264 (S.D.Ga. 1980). The Forms 4340 are no more than a self-serving allegation of fact from the IRS dated over 5 years after the alleged assessment, which serves only to beg the underlying question, but certainly does not answer it. The court has sanctioned the government's request to permit their claim to take precedence over the federal statutes and implementing regulation. Just as the Fifth Circuit in *Brafman* ruled that the Regulation at 301.6203-1 means what it says when it requires a proper signature on the assessment, so should this Court rule that the same regulation means what it says when it requires that the supporting record provide proper identification of the taxpayer, etc.

In *Stallard v. U.S.*, 70 AFTR 2d 92-6145, ¶ 92-5279 (W.D.Tex. 1992) this issue of the appropriateness of the forms 4340 as a supporting record was considered by the trial court. The regulation 301.6203-1 provides (Emphasis added.):

> "The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, **through supporting records**, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment * * * . The date of the assessment is the date the summary record is signed by an assessment officer. **If the taxpayer requests a copy of the records of assessment he shall be furnished a copy of *the pertinent part of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.***"

The Judge in *Stallard* pointed out that the regulation provides no guidance as to whether the tax period must be included in the summary record or the supporting record, but that it is undeniable that it must be contained in the summary record of assessment or the supporting record and furnished to the taxpayer upon request. This analysis is parallel to the issue here. Where are the Plaintiffs included in the alleged assessment and how can anyone know without the supporting record. In the *Stallard* case the government did produce four documents in excess of the Form 4340. Of the four documents the government did not dispute that none of them constituted supporting records, other than the summary record of assessment which itself is an assessment record. The *Stallard* court just as this court found that other than the assessment officer's signature the summary record of assessment or Form 23C does not contain any of the § 6203 or § 301.6203-1 requirements stating:

> It does not identify the taxpayer, identify the character of the liability assessed, identify the tax period, or state the amount of the assessment. Defendant admits, 'It is a summary of assessment made by one service center that have [been] posted to the Internal Revenue Service's main computer for one day. No individual assessment is shown on a 23C; it only shows total for the service center for each class of tax." Therefore, unless the supporting records satisfy the statutory requirements, there is no evidence that the IRS made a valid assessment against Stallard for the tax period ended March 31, 1982, before the extended statute of limitations expired on December 31, 1990.

The court had before it the Form 4340, but was looking to the assessment records for supporting documentation. As there was none, the court considered the treatment of the Form 4340 as a supporting document, determining that it did contain much of the necessary information required by the regulations but refused to provide the specter of presumptive regularity because it was not created during the period prior to the expiration of the statute of limitations on assessment. Why would the court take such a position? Because, if the Form 4340 is to be accepted as a supporting document of the assessment, it would have to be in existence prior to the expiration of the time to assess and signed by the

duly delegated assessment officer.[19] Importantly the supporting documents must be in existence at the time of the assessment according to the certification on the form its self.

The trial court and the appellate court based its decision on the presumption that in response to the Plaintiffs' FOIA request for documentation the disclosure officer **did not** complete his task and send all the documents he had which were in existence and related to the assessment. These courts elected one presumption over another: That the litigation produced forms which were more valid than the documents produced in response to a citizen FOIA request. Thus these courts say that it is presumed that the disclosure officer does not do his job, or is shoddy and prone to error when there is no likelihood of litigation; but, that when there is litigation the documentation created in response to it is more reliable than that produced through the FOIA request. The Plaintiffs suggest to this Honorable Court that in a free society we care little that our government may make mistakes, but care greatly that they are open and honest about them. If the documents were within the care and custody of the certifying official, what then is the problem in permitting discovery, or simply producing the existing records?

The appellate Court noted the disadvantage the Plaintiffs are left in is not without some force when declined a grant of discovery. Discovery was initiated with the filing of the complaint. It is not a sound basis to deny discovery on the ground that the documents have already been sought through FOIA. See *North v. Walsh*, 881 F.2d 1088 (D.C. Cir. 1989). The Plaintiffs were not provided the supporting records in existence at the time of the assessment in response to their FOIA request. Additionally, the 23C Recovery Effort Memoranda points out a variety of other deficiencies in making assessments other than a lack of signature.

The appellate court cited *Gutherie v. Sawyer*, 970 F.2d 733 (10th Cir. 1992) for the proposition that courts have denied such relief, even in the face of a proper F.R.Civ.P. 56(f) affidavit. Wayne and Dorothy Wells' case was consolidated with Gutherie's on appeal, and the decision of the District Court in Wells was reversed and remanded in part based on their submission of a proper 56(f) motion and affidavit. The Plaintiffs adequately created issues which were permissible for discovery in order to properly respond to the Defendant's motion for summary judgment.

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[19]None of these factors are present in this case. The Forms 4340 are incomplete in many respects and are not signed by the delegated assessment officer.

Particularly where discovery was initiated with the suit and the Defendant refused to cooperate. *Walton v. City of Southfield*, 748 F.Supp. 1214 (E.D.Mich. 1990).

In *Krisel v. Duran*, 258 F.Supp. 854, 861 (D.C.N.Y. 1966) *aff'd on other grounds*, 386 F.2d 179 (2nd Cir. 1967) *cert. denied*, 390 U.S. 1042, the court felt that although the plaintiff's claim was tenuous, it held that Rule 56(f) required plaintiff to be given an opportunity for discovery since defendants had exclusive knowledge of the facts upon which the claim must rest. Summary judgment was denied without prejudice to renewal if there were no future showing by the plaintiff. In *Riollano v. District Director of Internal Revenue*, 197 F.Supp. 318 (D.C.N.Y. 1961), the court held the plaintiff must be allowed an opportunity for discovery before granting summary judgment. See also *Sames v. Gable*, 732 F.2d 49 (3rd Cir. 1984); *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988).

Plaintiff points out the language of *Hickman v. Taylor*, 329 U.S. 495, 507 (1947):

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the state at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

Finally, the Plaintiff's point out that just last November this high court changed the treatment of taxpayers in summons cases. *Church of Scientology of California v. United States*, ___ U.S. ___, 1992 U.S. Lexis 7197 (1992). In that case this court noted the different treatment of summons' issued by the IRS from the treatment of summons' issued by other agencies of government. With respect to the use of the Form 4340 and its presumptive proof, there has been a different treatment afforded to the IRS than that of any other class of litigant. The Plaintiffs' request that this Honorable Court review the circumstances of this case in contrast to decisions made in tax cases versus decisions made in non-tax cases.

CONCLUSION

The Plaintiffs' contend this court should grant the writ of certiorari in light of the discussion concerning the proper definition of supporting

documents and the application of F.R.Civ.P. 56(f). The result which is occurring is the creation of an irrebuttable presumption when the government offers the Form 4340 Certificate of Assessments and Payments. The Plaintiffs have adequately shown the lack of appropriate records, and permitting competing presumptions is an understandable mistake, but nonetheless a mistake which must be corrected.

> "'[I]in cases of doubt, a taxing statute must be construed most strongly in ***favor*** of the taxpayer and against the government. Tax statutes are not to be extended by implication beyond the clear import of the language used.' *Greyhound Corp. v. United States*, 945 F.2d 863, 869 (9th Cir. 1974)."

Max Sobel Wholesale Liquors v. CIR, 630 F.2d 670, 672 (9th Cir 1980).

WHEREFORE the Plaintiffs' respectfully request this court grant the writ of certiorari to review the judgment of the appellate and district Courts and to reverse the decision of judgment for the Defendant and remand this cause with instructions to permit discovery into all relevant process related to the alleged assessments and notices. That this Court reverse the decision of the trial count and reinstate Counts I, II, III, IV, and VI, of the Plaintiff's Amended Complaint.

DAVID W. NIEMELA
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Petitioning in their proper persons

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID NIEMELA and ANN MARIE NIEMELA, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	))))))))	CIVIL ACTION NO. 90-10110-WD

MEMORANDUM AND ORDER
August 4, 1992

David and Ann Marie Niemela instituted this action against the United States pursuant to 28 U.S.C. § 2410 to quiet title to real property owned by the Niemelas on which the United States has a lien. The Niemelas also sought damages from the United States for the Internal Revenue Service's (1) release of confidential information; (2) failure to release the lien; and (3) reckless conduct in imposing the lien without a valid formal assessment. In addition, the Niemelas sought an injunction to protect their interests in their property. The government, claiming that the lien and assessment are valid and denying the remainder of plaintiff's claims, moved to dismiss the complaint or for summary judgment.

Plaintiffs moved to amend their complaint by eliminating certain claims. I will allow the motion. Because the government's motion to dismiss or for summary judgment and supporting memorandum addressed the issues raised in the first Amended Complaint, I treat the government's motion to dismiss or for summary judgment as applicable to the plaintiffs' first Amended Complaint.

I

The government expressly moved to dismiss the Niemelas' complaint and for summary judgment. Because I have considered materials submitted by the government beyond the pleadings, I treat

its motion as one for summary judgment. In their response to the government's motion the plaintiffs purported to reserve their right to respond to the summary judgment motion and addressed only the motion to dismiss. The plaintiffs are not entitled to so reserve, were on clear notice that the government moved for summary judgment and have had ample opportunity to respond. There is no justified impediment to evaluation of the motion in terms of summary judgment standards.

A grant of summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). Consequently, I view the facts in the light most favorable to the opposing parties, the Niemelas. Spacemaster Int'l Inc. v. City of Worcester, 940 F.2d 16, 17 (1st Cir. 1991). When a motion for summary judgment is made and supported with sworn copies of papers, as here, however, the adverse parties may not rest upon the mere allegations or denials of their pleadings. Rather, the adverse party's response must by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The Niemelas have failed to set forth specific facts in controversy and thus I treat the government's statement of facts as admitted by the plaintiffs.[1]

II

The Niemelas filed a joint federal income tax return for the 1979 tax year. David Niemela filed a protest return for the 1980

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[1] The Niemelas sought pursuant to Fed.R.Civ.P. 56(f) to defer consideration of the summary judgment motion pending further discovery. To invoke Rule 56(f) properly "a party 'must articulate a plausible basis for the belief that discoverable materials exist which would raise a trial worthy issue." Bank One Texas, N.A. v. A.J.Warehouse, Inc., ___F.2d___, ___, slip op. at 14 (1st Cir. No. 91-1826, June 30, 1992) (quoting Price v. General Motors Corp., 931 F.2d 162, 164 (1st Cir. 1991)). I have carefully reviewed the plaintiffs' Rule 56(f) submissions and their related submissions regarding discovery and do not find any discovery proposed but otherwise unavailable during the period before the discovery cutoff that could plausibly be said to have led to the development of evidence actually relevant to my disposition of the government's motion.

tax year in which he claimed to be a Life Science Minister. The IRS, prompted by the 1980 protest return, audited the Niemelas' 1979 return. As a result of the audit, the Niemelas were assessed a deficiency. On April 6, 1983, the IRS mailed by certified mail a statutory notice of deficiency for the 1979 tax year addressed to the Niemelas. The notice informed the Niemelas of their right to petition the Tax Court within 90 days of the mailing date.

The Niemelas filed a case with the Tax Court concerning the 1979 deficiency. The Tax Court dismissed their case on October 15, 1984 for failure to prosecute properly and determined that there was a "deficiency in income tax due from [plaintiffs] for the taxable year 1979 in the amount of $3,435.30 and an addition to the tax due" of $171.76 for a negligence penalty.

Assessments were made against plaintiffs on January 22, 1985 for the taxable year 1979 and Notices of Federal Tax Lien covering the Niemelas' liability were filed July 8, 1987 with the Registry of Deeds for Southern Middlesex County, Cambridge, Massachusetts, and with the Clerk of this Court.

David Niemela failed to file any tax returns for the 1981 and 1982 tax years. In accordance with 26 U.S.C. § 6020(b), the IRS prepared substitute income tax returns based on the Niemelas' 1979 return and bank records. On September 7, 1988 a statutory notice of deficiency for the 1980, 1081 and 1982 taxable years was sent by certified mail and addressed to David Niemela. Niemela did not petition the Tax Court to review the deficiencies and assessments were made on February 9, 1989. A Notice of Federal Tax Lien was filed on July 12, 1989 for the 1980, 1981 and 1982 taxable years in this Court by electronic filing and in the Southern Middlesex County Registry of Deeds.

On November 12, 1986 the IRS issued a levy to North Middlesex Regional School System. The system paid to the IRS monies belonging to David Niemela in the amount of $791.76.

III

In Count I of their Amended Complaint the Niemelas seek to quiet title to certain real and personal property owned by them on which the government has placed a lien. As grounds therefor, the Niemelas claim that (A) the Notice of Deficiency issued for the

tax years in question was defective on its face; (B) David Niemela was not an individual required to file a federal tax return for the years in question; (C) the IRS selected the Niemelas for auditing in a discriminatory manner; (D) the assessment of taxes for the years in question was unlawful because of IRS failure to follow regulations; (E) the government failed to issue the Notice and Demand required by 26 U.S.C. § 6303 after assessment is made; and (F) the government failed to send the Notice of Deficiency required by 26 U.S.C. § 6212. I address each as follows:

A. Notices of Deficiency

The government has submitted in connection with the instant motion, copies of: (1) a Notice of Deficiency dated April 6, 1983 for the 1979 taxable year,[2] addressed to the Niemelas at their last-known address and stamped "Certified Mail," setting forth the amount of the deficiency and the tax year involved; and (2) a Notice of Deficiency for the 1980, 1981 and 1982 taxable years dated September 7, 1988 addressed to David Niemela at his last-known address, setting forth the amount of the deficiency and the tax years involved. The minimum requirement for a notice of deficiency is that the notice set forth the amount of the deficiency and the tax year involved. Geiselman v. United States, 961 F.2d 1, 5 (1st Cir. 1992). The notices at issue here comply with these requirements.[3] The Niemelas have no cause of action based on

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[2] The government notes that any claim concerning the 1979 tax year is precluded by the doctrine of res judicata because the Niemelas' petition to the Tax Court was dismissed for failure to prosecute properly, which is a resolution on the merits. I decline to reach this argument because I find no merit to any of the plaintiffs' claims.

[3] The Niemelas claim the Notices of Deficiency were invalid for (1) failing to include a statement that an IRS employee has examined the plaintiffs' return; (2) omitting a pen and ink signature; (3) omitting a statement of approval by District Counsel; (4) failing to compute in accord with 26 U.S.C. § 6211; (5) lacking back-up documents required by 26 U.S.C. § 6110; and (6) not being certified pursuant to 26 U.S.C. § 7622. See Plaintiffs' First Amended Complaint, ¶ 13. However, the Niemelas make no showing that the IRS is required to meet any of these requirements. In particular, Section 7622 merely authorizes IRS

(continued...)

these Notices.

B. David's Filing Requirement

Evaluation of the claim regarding whether David was required to file a federal tax return would necessitate inquiry into his income and taxpaying status. As such, it is a challenge to the underlying tax liability. A taxpayer cannot use Section 2410 to challenge the underlying tax liability; a taxpayer must pay any assessment and make an administrative claim for a refund before suing to challenge a tax liability. See McMillen v. United States, 960 F.2d 187, 189 (1st Cir. 1991). Thus, I do not address the merits of David's status claim because I lack subject matter jurisdiction over it.

C. Discriminatory Selection

The Niemelas claimed that they were selected for auditing in a discriminatory manner in violation of IRS policy. The government responded by noting that David had filed a protest return in 1980, which prompted the IRS to audit the Niemelas' 1979 return. Selecting tax protesters for audit amounts to a rational response by the IRS to the problem of identifying those taxpayers who may be evading their tax liability. Any discrimination is hardly invidious and cannot serve as the ground for relief from a tax lien.

D. E. & F. Assessments and Notice and Demand for Payment

The Niemelas claim that the IRS failed to create a proper assessment of tax. Assessments are made by "recording the liability of the taxpayer in the office of the Secretary." 26 U.S.C. § 6203. The IRS makes assessments by having an assessment officer fill out and sign a "summary record of assessment," also

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[1](...continued)
personnel to certify papers; Section 6110 requires back-up documentation for rulings, determination letters or technical advice memoranda, none of which are present here. These grounds for invalidity are spurious.

known as a Form 23C. Geiselman, 961 F.2d at 5. Here the government did not provide a Form 23C for each assessment at issue but submitted to this Court in connection with the instant motion a Certificate of Assessments and Payments (Form 4340) for the 1979 taxable year and for the 1980, 1081 and 1982 taxable years. Certificates of Assessments and Payments are routinely used to prove that tax assessment was in fact made, Geiselman, 961 F.2d at 6, and I conclude that the IRS made valid assessments against the Niemelas.

Moreover, the Certificates of Assessment constitute presumptive proof, unrefuted in any fashion by the Niemelas, that the IRS gave notice of the assessment and made demands for payment from the Niemelas. See Geiselman, 961 F.2d at 6. I conclude that the IRS gave proper Notice and Demand for Payment for the assessments for the years in question.

In short, the record discloses no procedural irregularity with respect to the IRS's lien on the plaintiffs' property. Thus, they are not entitled to a quiet title. I will grant the government's motion for summary judgment as to Count I of plaintiffs' first Amended Complaint.

IV

The Niemelas' claim in Count II of their Amended Complaint that the United States and its agents and employees disclosed the Niemelas' return and return information in order to obtain liens on their property and a levy on certain monies held by the North Middlesex Regional School District. A taxpayer may sue for intentional or negligent disclosure of tax return information when the disclosure is in violation of 26 U.S.C. § 6103. 26 U.S.C. § 7431. However, Section 6103(h)(4) authorizes IRS employees to disclose tax return information in a federal or state judicial or administrative proceeding pertaining to tax administration and Section 6103(k)(6) authorizes IRS employees to disclose such information for investigative purposes. Here the IRS obtained a lien on real and personal property of the Niemelas and levied on certain monies held by a third party in order to satisfy an assessment lawfully imposed on the Niemelas. Any disclosure that occurred here in pursuing the lien and the levy was well within the

authority granted the IRS by Section 6103. I will grant the government's motion for summary judgment as to Count II, the plaintiffs' claim for intentional or negligent disclosure of tax return information.

V

In Count III of the Amended Complaint, the Niemelas seek damages for the IRS's failure to release the liens on their property. Such relief is obtainable pursuant to 26 U.S.C. § 7432 only if, in accordance with 26 U.S.C. § 6325, the lien is satisfied or unenforceable or a bond is accepted by the Secretary of the Treasury. The Niemelas have made no showing that any of the conditions imposed by Section 6325 have been met, and thus they are not entitled to any release of a lien. See McMillen, 960 F.2d at 190. Thus, I will grant the government's motion for summary judgment as to Count III, the plaintiffs' claim for damages for failing to release a lien.

VI

The Niemelas claim in Count IV of the Amended Complaint that agents and employees of the United States recklessly and intentionally disregarded provisions of the Internal Revenue Code in making the assessment and pursuing liens and a levy. See 26 U.S.C. § 7433. However, the record discloses no basis for finding that the government's agents and employees acted improperly in any way in making the assessment and obtaining the liens and levy. A fortiori, there is no evidence of any provision of the Code intentionally or recklessly disregarded by an agent or employee of the defendant. Thus, I grant the government's motion for summary judgment as to Count IV, the plaintiffs' claim under 26 U.S.C.§ 7433.

VII

The Niemelas seek in Count VI of their Amended Complaint an injunction pursuant to 26 U.S.C. § 7426 to protect their interests in real and personal property. Section 7426 permits

a person to bring an action, and obtain an injunction, against the United States when a levy has been made on property, but only when that person is not the person who owes the tax assessment for which the levy was made. The government has made a valid assessment of tax against the Niemelas and has sought liens and a levy to satisfy that assessment. The Niemelas cannot maintain any action under Section 7426. Thus I grant the government's motion for summary judgment on Count VI[4] the plaintiffs' claim under Section 7426.

VIII

For the foregoing reasons, I ALLOW the plaintiffs' motion to amend their complaint and thereupon ALLOW the government's motion for summary judgment. However, finding that the pro se plaintiffs' litigation positions--while wrong-headed--did not in this case constitute abuse, I DENY the government's motion for sanctions.

/S/
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

[4] There is no Count V in the plaintiffs' first Amended Complaint.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID NIEMELA and ANN MARIE NIEMELA, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 90-10110-WD
UNITED STATES OF AMERICA, Defendant	)	

JUDGMENT

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued on August 4, 1992, allowing the Defendant's Motion for Summary Judgment, it is hereby ORDERED

Judgment for the defendant against the plaintiffs.

BY THE COURT,

/S/
Deputy Clerk
DATED: August 5, 1992

APPENDIX B - 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2192DAVID AND ANN MARIE NIEMELA,
Plaintiff, Appellants,

v.

UNITED STATES OF AMERICA
Defendant, Appellee.

JUDGEMENT

Entered June 11, 1993

This case came on to be submitted on the briefs and the original record on appeal from the United States District Court of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgement of the district court is affirmed in part, vacated in part and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date.

By the Court:

FRANCIS P. SCIGLIANO ,CLERK.
FRANCIS P. SCIGLIANO
(Messrs. Niemela & Pappalardo)

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2192

DAVID & ANN MARIE NIEMELA,
Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Douglas P. Woodlock, U.S. District Judge]

Before
Torruella, Cyr and Stahl,
Circuit Judges.

David W. Niemela and Ann Marie Niemela on brief pro se.
A. John Pappalardo, United States Attorney, James A. Bruton, Acting Assistant Attorney General, Gary R. Allen, David I. Pincus, and Jordan L. Glickstein, Attorneys, Tax Division, Department of Justice, on brief for appellee.

JUNE 11, 1993

Per Curiam. Claiming that the Internal Revenue Service (IRS) violated an array of statutory requirements in its effort to collect unpaid taxes, David and Ann Marie Niemela filed this pro se action seeking to "quiet title" to their property and requesting injunctive relief and damages. From an award of summary judgment to the IRS, they now appeal. We agree with the district court's conclusions in all but two particulars, as to which we find the IRS' evidence wanting.

I.

David Niemela, a plumber by trade and a member of an organization opposed to this country's system of income taxation, filed a "protest return" for 1980 on behalf of himself and his wife. For the years 1981 and 1982, the Niemelas filed no returns at all. Prompted by the protest return, the IRS audited their 1979 return and determined that a deficiency existed for that year. The Niemelas sought to challenge this finding in Tax Court, but their petition was later dismissed on procedural grounds, Thereafter, based on "substitute returns" prepared under 26 U.S.C. § 6020, the IRS determined that deficiencies also existed for the years 1980-82. As to these findings, no Tax Court petition was filed. After allegedly making the requisite assessments and issuing the requisite notices, the IRS attempted to recoup the deficiencies--first by levying on money owed to David Niemela by a local school, and then by filing various liens on the couple's real and personal property. The IRS calculates that, as of 1989, a debt of some $180,000 remained unpaid, consisting of back taxes, interest and penalties.

The assessment and notice requirements at issue here can be outlined as follows. Upon determining that a deficiency exists, the IRS first must send a notice of deficiency to the taxpayer. 26 U.S.C. § 6212. The taxpayer then has ninety days to file a petition in the Tax Court in order to contest the deficiency determination. Id. § 6213. If such a petition is filed, the IRS is barred from taking any action to collect the debt until the Tax Court decision has become final. Id. §§ 6213(a), 6215. If no such petition is filed (or once the Tax Court decision becomes final), the IRS must then

make an assessment of the deficiency, id. § 6303. If the deficiency is not paid, a lien arises in favor of the United States on all real and personal property of the taxpayer, id. § 6321, as of the date of the assessment, id. § 6322. The IRS may thereafter levy upon such property after providing the taxpayer with notice of its intention to do so. Id. § 6331.

The Niemelas contend that none of these safeguards was followed. In particular, they argue that: (1) no proper notices of deficiency were sent; (2) no assessments of the deficiencies were made; (3) no notices and demands for payment were mailed; and (4) no notice of intent to levy was provided. For these reasons, they say that relief is warranted under the quiet title statute, 28 U.S.C. § 2410.[1] They also seek damages pursuant to three other provisions: under 26 U.S.C. § 7431 for unlawful disclosure of return information; under § 7432 for failure to release liens; and under § 7433 for unauthorized collection actions. Finally, they seek an injunction under § 7426 for wrongful levy. Apart from these various claims (each of which the district court rejected), the Niemelas advance an additional contention on appeal: that the district court erred in denying their motion under Fed. R. Civ. P. 56(f) to defer consideration of the summary judgment motion pending further discovery. We review the district court's award of summary judgment in plenary fashion, construing the record in the light most favorable to the opposing party. See, e.g., Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993).

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[1] A taxpayer in a quiet title action cannot contest the merits of the underlying tax assessment, but can challenge alleged defects in the procedures giving rise to an IRS lien or levy. See, e.g., Geiselman v. United States, 961 F.2d 1, 6 (1st Cir.) (per curiam), cert. denied, 113 S. Ct. 261 (1992); McMillen v. Department of Treasury, 960 F.2d 187, 189 (1st Cir. 1991) (per curiam). In Geiselman, we noted that courts had divided as to whether a defect in a notice of deficiency may be challenged in such an action. See id. at 6 n.1. We need not address this issue here, however, as the government has not raised it, and as we find no such defect in any event.

II.

The Niemelas have devoted only cursory attention on appeal to several of these claims, to the point where a waiver might well be inferred. Nonetheless, in light of their pro se status, we shall address each of their contentions in turn.

A. Notices of Deficiency

The IRS submitted copies of two notices of deficiency said to have been sent to the Niemelas: one dated April 6, 1983 pertaining to the year 1979, the other dated September 7, 1988 pertaining to the years 1980-82.[2] The Niemelas argue, somewhat paradoxically, both that no notices of deficiency were sent and that such notices were inadequate in form. Yet in ¶ 50 of their original complaint, they acknowledged having received the notices.[3] And a notice of deficiency is adequate so long as it satisfies the "minimum requirements" of setting forth the amount of the deficiency and the tax year involved. Geiselman v. United States, 961 F.2d 1, 5 (1st Cir.) (per curiam), cert. denied, 113 S. Ct. 261 (1992). The notices here did just that.

B. Assessments; Notices and Demands for Payment

An assessment is made "by recording the liability of the taxpayer in the office of the [Treasury] Secretary in accordance with rules or regulations prescribed by the Secretary." 26 U.S.C. § 6203.

> The assessment shall be made by an assessment officer signing the summary record of assessment.

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[2] Contrary to the taxpayers' suggestion, the IRS does not content that the second notice was sent on February 9, 1989. Its statement to that effect in its brief is obviously an inadvertent misstatement.

[3] Section 6212 requires only that the IRS mail a notice of deficiency to the taxpayer's last home address, not that the taxpayer actually receive it. See, e.g., Guthrie v. Sawyer, 970 F.2d 733, 737 (10th Cir. 1992); United States v. Zolla, 724 F.2d 808, 810 (9th Cir.), cert. denied, 469 U.S. 830 (1984).

> The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, *if applicable, and the amount of the assessment....* The date of the assessment is the date the summary record is signed by an assessment officer.

26 C.F.R. § 301.6203-1. Within sixty days of an assessment being made, the IRS must "five notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." 26 U.S.C. § 6303(a). Such notice must be left at the taxpayer's dwelling or usual place of business or sent by mail to his last known address. Id. No particular form is required, so long as the notice "provides the taxpayer with all the information required under ... § 6303(a)." Elias v. Connett, 908 F.2d 521, 525 (9th Cir. 1990).

The IRS alleges that, for the 1979 deficiency, an assessment was made and notice sent on January 22, 1985; it states that, for the 1980-82 deficiencies, assessments were made and notices sent on February 9, 1989. To substantiate these claims, the IRS did not submit copies of the summary record, known as Form 23C,[4] nor did it provide copies of the actual notices and demands for payment. Instead, it provided several "certificates of assessments and payments." Known as Form 4340, these are computer-generated transcripts showing all transactions in a taxpayer's account for a particular year. Each of the certificates contains a column entitled "23C Date," which lists the date or dates on which the assessment officer signed a Form 23C. And each contains a notation entitled "First Notice," which documents when notice and demand for payment was sent.

We held in Geiselman, in accordance with the vast weight of authority, that such certificates are "routinely used" to prove that

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[4] The taxpayers, however, did obtain copies of the applicable Forms 23C through an earlier Freedom of Information Act request and attached them to their pleadings below. As these documents reveal, and as other courts have noted, a Form 23C contains no individualized information as to any specific taxpayer, but rather simply summarizes the total assessments made by the IRS service center for each class of tax on a particular day. See, e.g., Stallard v. United States, 806 F. Supp. 152, 158 (W.D. Tex. 1992).

the assessment and notice procedures were satisfied. 961 F.2d at 6. More particularly, we held that the 23C Date is presumptive proof that a valid assessment occurred, and that the First Notice is likewise presumptive proof that the IRS gave notice and demand for payment.[5] Id.; accord, e.g., Farr v United States, __ F.2d ___, 1993 WL 86986, at *2 (9th Cir. 1993) ("Certificates were proper evidence of the propriety of the assessment proceedings in all particulars"); Long v. United States, 972 F.2d 1174, 1181 (10th Cir. 1992); Gentry v. United States, 962 F.2d 555, 557 (6th Cir. 1992); Rocovich v. United States, 933 F.2d 991, 994 (Fed.Cir. 1991); United States v. Chila, 871 F.2d 1015, 1017-18 (11th Cir.), cert. denied, 493 U.S. 975 (1989).

With one exception, the certificates here contain 23C Date and First Notice entries that substantiate the IRS's claim that the assessments were made and the notices mailed on the dates indicated. Nothing offered by the Niemelas calls this evidence as a whole into question. The one exception is the absence in the 1982 certificate of any 23C date corresponding to the alleged February 9, 1989 assessment. On account of this omission, and because the IRS relied solely on the certificate for its proof on this issue, we conclude that a factual dispute remains as to whether a valid assessment occurred for the year 1982.[6] See, e.g., Brewer v.

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[5] The Niemelas allege that the certificates are inadmissible for sundry reasons--for example, that they lack a Treasury seal, were not properly certified, are hearsay, are not best evidence, and were prepared for purposes of this litigation. These and related arguments have been rejected on numerous occasions. See, e.g., Long v. United States, 972 F.2d 1174, 1181 (10th Cir. 1992); Hughes v. United States, 953 F.2d 531, 539-40 (9th Cir. 1992); McCarty v. United States, 929 F.2d 1085, 1089 (5th Cir. 1991).

[6] To be sure, there are other intimations in the record that as assessment did occur for that year. The 1982 certificate contains a First Notice entry for February 9, 1989; the sending of notice and demand suggests (but does not confirm) that an assessment was first made. In addition, the liens filed on July 10, 1989 make reference to an assessment for 1982. Most important, the taxpayers have submitted a copy of their Individual Master File (obtained through a Freedom of Information Act request). For the year 1982, in entries dated February 9, 1989, the deficiency penalties and interest are all listed,

(continued...)

United States, 764 F. Supp. 309, 315-16 (S.D.N.Y. 1991) (issue of fact remained where certificate did not contain 23C dates) (noted in Geiselman, 961 F.2d at 6).

C. Notice of Intent to Levy

As mentioned, the IRS in November 1986 levied on monies owed by the North Middlesex Regional School System to David Niemela, presumably in response to the 1979 deficiency which had been assessed the previous year. The school ended up forwarding approximately $790 to the IRS. The Niemelas claim that no notice of intent to levy was provided, as required by 26 U.S.C. § 6331(d).[7] The government failed to address this claim in its various submissions, either below or on appeal, and the district court made no mention of it in its decision. This is hardly surprising. The Niemelas have advanced a welter of prolix, often far-fetched, allegations, accompanied by a profusion of supporting materials.[8] And their complaint contains only an oblique reference

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[6](...continued)
together with the notation "ASED." We assume, but are reluctant to conclude without confirmation, that this refers to an assessment. Under the circumstances, we think a limited remand for clarification on this point is warranted--either through a renewed motion for summary judgment or by other means.

[7] See also 26 C.F.R. § 301.6331-2(a):

> Levy may be made upon the salary or wages of a taxpayer for any unpaid tax only after the district director ... has notified the taxpayer in writing of the intent to levy. The notice must be given in person, left at the dwelling or usual place of business of the taxpayer, or be sent by mail to the taxpayer's last known address, no less than 10 days before the day of levy. The notice of intent to levy is in addition to, and may be given at the same time as, the [§ 6331] notice and demand ....

[8] For example, in their original complaint, the taxpayers alleged, inter alia, that the failure to publish Treasury Department delegation orders in the Federal Register deprived the IRS of authority to collect taxes, and that the use of Form 1040 was invalid under the Paperwork Reduction Act of 1980.

to the alleged lack of notice of intent to levy--identifying such requirement only by statutory citation, not by name.[9] Nonetheless, construing the complaint liberally in light of the Niemelas' pro se status, we think it can and should be read to advance such a claim. We also note that the Niemelas voiced this allegation more explicitly in subsequent submissions, such as in their response to the IRS's motion for summary judgment and in their Rule 56(f) motion to defer. Accordingly, we think a remand is warranted as well for consideration of this claim.[10]

D. Claims for Damages and Injunctive Relief

The Niemelas contend that the IRS is subject to damages for unlawfully disclosing return information to third parties in connection with the issuance of the liens and levy. This claim, as they acknowledge, is largely derivative of those described above. Under 26 U.S.C. § 7431, a taxpayer may recover damages for the intentional or negligent disclosure of return information in violation of § 6103. Section 6103, in turn, establishes the general rule that such information is confidential, subject to various enumerated exceptions. It is well settled that one such exception, contained in § 6103(k)(6), authorizes the disclosure of tax return information to

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[9] The amended complaint asserts ambiguously that the IRS failed to send "valid lawful Notices of Deficiency, or Notices of Assessment and Demand for Payment based on Form 23C Certificate of Assessment and other required documentation, as required by Sections 6212(a) and (b), 6303(a), and 6331(b) and (d)(2) ...." Amended Compl. ¶ 21 (emphasis added). Their original complaint contained identical language.

[10] It appears from the amended complaint that no ongoing levy is in place, and that the taxpayers are seeking simply to recover previously garnisheed wages now in the IRS' hands. If so, a quiet title action may not lie. See, e.g., Farr, _ F.2d at __, 1993 WL 86986, at *2; Hughes, 953 F.2d at 538. Nonetheless, if the notice of intent to levy were deemed invalid, the taxpayers might still have a viable claim for damages for unlawful disclosure under 26 U.S.C. § 7431. See, e.g., Rorex v. Traynor, 771 F.2d 383 (8th Cir. 1985). We express no opinion on these issues, preferring that the lower court address them in the first instance, if necessary.

the extent necessary to effect a valid lien or levy. [11] See, e.g., Farr, __ F.2d at __, 1993 WL 86986, at *3 to *4; Long, 972 F.2d at 1180; Hughes v. United States, 953 F.2d 531, 542 (9th Cir. 1992); Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990); Bleavins v. United States, 807 F. Supp. 487, 488 (C.D. Ill. 1992) ("In other words, the IRS may disclose information when attempting to collect taxes."). Given our earlier findings that the procedures giving rise to the liens with respect to the assessed deficiencies for the years 1979-81 were valid, the Niemelas' § 7431 claim with respect thereto must fail. On the other hand, we have found that factual disputes exist as to whether a proper assessment for 1982 was made and whether a notice of intent to levy was issued. Should it be determined on remand, that either of these procedures was deficient, the § 7431 claim should then be addressed to that limited extent. See, e.g., James v. United States, 97- F.2d 750, 757 n.13 (10th Cir. 1992).

Such a "contingent" remand is likewise appropriate for the Niemelas' § 7433 claim. That provision permits the recovery of damages for the IRS' intentional or reckless disregard of any provision of the tax laws "in connection with any collection of Federal tax." 26 U.S.C. § 7433(a). The Niemelas claim entitlement to such relief on account of the allegedly deficient assessment and notice procedures discussed above. Again, however, the only potential defects involved the assessment for 1982 and the notice of intent to levy. And because § 7433 applies only to actions occurring after November 10, 1988, see, e.g., Gonsalves v. Internal Revenue Service, 975 F.2d 13, 16-17 (1st Cir. 1992) (per curiam), any defect in the 1986 levy would provide no basis for recovery. By contrast, should the assessment for 1982 be deemed invalid, a § 7433 claim might lie to the extent that the 1989

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[11] Section 6103(d)(6) provides that an IRS employee may, in connection with "his official duties relating to ... collection activity," disclose return information where necessary to obtain information "with respect to the enforcement of any other provision of this title." The accompanying regulation states that such disclosure is warranted in order "to apply the provisions of the Code relating to establishment of liens against [the taxpayer's] assets, or [a] levy on ... the assets to satisfy any [outstanding] liability." 26 U.S.C. § 301.6103(k)(6)-1(b)(6).

lien pertained to the deficiency for that year.[12] The district court should likewise address this issue on remand should it prove necessary.

The Niemelas' remaining two claims require little comment. Section 7432 authorizes an award of damages where the IRS fails to release a lien in accordance with § 6325--i.e., where the lien is satisfied or unenforceable or a bond is accepted by the Treasury Secretary. There has been no showing that any of these conditions has been satisfied. Section 7426, in turn, permits an award on injunctive relief and damages for wrongful levy. Yet only a person "other than the person against whom is assessed the tax out of which such levy arose" may file such an action. 26 U.S.C. § 7426(a)(1). The Niemelas obviously do not fit such description.

E. Rule 56(f) Motion to Defer

Finally, the Niemelas argue that the district court erred in granting summary judgment to the IRS without allowing them an adequate opportunity to obtain discovery. The Niemelas sought to obtain a multitude of documents pertaining to the assessment and notice procedures, along with depositions of various IRS officials with regard thereto--all without success.[13] They later asked that any ruling on the IRS' summary judgment motion be deferred pending such discovery, and filed a detailed affidavit attempting to explain how such materials would lead to "facts essential to justify [their] opposition" to the motion. Fed. R. Civ. P. 56(f). In the course of its ruling on the summary judgment motion, the district court denied this request on the ground that none of the proposed discovery "could plausibly be said to have led to the development

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[12] The government argues that the Niemelas' § 7431 claim has been superseded by § 7433, and that their § 7433 claim is barred for failure to exhaust administrative remedies. We leave these issues for the district court to decide in the first instance, if necessary.

[13] The IRS declined to respond to such requests pending decision on its motion to dismiss or in the alternative for summary judgment. The Niemelas then moved to compel production, and the IRS responded with a motion for a protective order. These various motions were never acted on by the court.

of evidence actually relevant to my disposition of the government's motion." We review an order denying relief under Rule 56(f) for abuse of discretion. See, e.g., Bank One Texas, N.A. v. A.J.Warehouse, Inc., 968 F.2d 94, 100 (1st Cir. 1992).

A party seeking a Rule 56(f) deferral must, inter alia, "articulate a plausible basis for the belief that discoverable materials exist which would raise a trial worthy issue." Price v. General Motors Corp., 931 F.2d 162, 164 (1st Cir. 1992) (must show that "specified discoverable material facts" likely exist). While the Niemelas sought materials pertaining to all aspects of the collection process, their request focused on the original documents underlying the assessments--the "supporting records" mentioned in 26 C.F.R. § 301.6203-1 from which Form 23C is prepared. Their request in this respect was two-pronged. They contended that they were specifically entitled to such records under the terms of the regulation. And they argued more generally that obtaining such evidence was their only means of rebutting the presumption of validity arising from the Form 4340 certificates.

The IRS' submission of the certificates satisfied the disclosure requirements of 26 C.F.R. § 301.6203-1. That regulation specifies that a taxpayer is entitled only to a copy of the "pertinent parts" of the assessment record.[14] And as the Ninth Circuit has explained:

> Those pertinent parts need only provide the five items listed in the Regulations [taxpayer's name, date of assessment, character of liability, tax period if applicable, and amounts assessed].... Neither the Tax Code nor the Treasury Regulations require those pertinent parts to be original documents, and the IRS has selected the certificate of assessments and payments as the means for providing the information specified.

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[14] Section 301.6203-1 states in relevant part: "If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed."

> .... We therefore conclude that the plaintiffs are not entitled to the original supporting documents used to compile the summary record.

Gentry, 962 F.2d at 558; see also Hughes, 953 F.2d at 539 & n.4; Chila, 871 F.2d at 1017. With the exception of a "23C Date" for the 1982 assessment, the certificates submitted in the instant case contain all of the specified information.

Assuming arguendo that this regulation does not prescribe the range of permissible discovery, we likewise find no abuse of discretion in the court's decision to address the summary judgment motion without affording the Niemelas the opportunity to secure such materials. To be sure, the Niemelas' central argument--that it is difficult, in the absence of discovery, to adduce evidence rebutting the presumption of correctness arising from the certificates--is not without some force. Yet whether or not the supporting documents underlying the assessments might be deemed relevant to their claims,[15] the circumstances here amply support the court's ruling.

First, at the root of the Niemelas' Rule 56(f) motion were the allegations that the certificates were inadequate to satisfy the regulation's disclosure requirements and were otherwise inadmissible. As mentioned, these arguments are misplaced. Second, the Niemelas had already obtained many of the underlying documents--including all Forms 23C and their individual master files--through earlier Freedom of Information Act requests. See Brewer, 764 F. Supp. at 318 (denying Rule 56(f) motion, among other reasons, because of information obtained through FOIA requests). Third, apart from their unilateral assertions, the Niemelas articulated no reason to suspect that procedural irregularities

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[15] Compare, e.g., Guthrie v. Sawyer, 970 F.2d 733, 738 (10th Cir. 1992) (supporting documents not relevant) and McCarty v. United States, 929 F.2d 1085, 1088-89 (5th Cir. 1991) (same) with, e.g. Farr, ___ F.2d at ___ (notwithstanding submission of certificate, taxpayer should have "been given the opportunity to conduct some discovery before judgment was entered") and Rand v. United States, ___ F. Supp. ___, 1993 WL 127098, at *2 (W.D.N.Y. 1993) (original notices, while "clear[ly] ... relevant," need not be produced).

attended the assessment process.[16] And the district court was warranted in discounting those assertions, inasmuch as the Niemelas voiced similar allegations with respect to every aspect of the collection process. Fourth, in light of the number of claims advanced and the extent to which they were "wrong-headed" (to use the district court's term), the court could well have concluded that the discovery requests amounted to a "fishing expedition."

Finally, we note that the Niemelas' claim in this regard falls under the vast weight of authority. To be sure, a handful of lower courts, in unpublished decision, have permitted discovery of the original assessment documents or have granted Rule 56(f) motions for that purpose. The Niemelas point to several; others exist. Yet in the clear majority of cases (including dozens of unpublished decisions), courts have denied such relief, even in the face of a proper Rule 56(f) affidavit. See, e.g., Guthrie v. Sawyer, 970 F.2d 733, 738 (10th Cir. 1992); Montgomery v. United States, 933 F.2d 348, 350 (5th Cir. 1991); McCarty v. United States, 929 F.2d 1085, 1088-89 (5th Cir. 1991); Brewer, 764 F. Supp. at 318; Rossi v. United States, 755 F. Supp. 314, 319 (D. Or. 1990), aff'd, 983 F.2d 1077 (9th Cir. 1993). We are unaware of any appellate court reversing such a ruling in this context.[17]

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[16] The Niemelas place considerable emphasis on an April 1990 IRS memorandum reporting that a small number of irregularities had occurred in the process by which the 23C Forms were signed. Yet, through an FOIA request, the Niemelas received copies of the 23C Forms applicable to their assessments. They have voiced no complaint regarding the signatures appearing thereon. The Niemelas also allege that the number of entries in their individual master files differs from the number appearing on the certificates. Any such discrepancy is beside the point, given that the master files do contain pertinent entries for each of the dates on which the assessments in question here allegedly occurred.

[17] We reject without comment the Niemelas' remaining claims, including the allegation that they were improperly selected for audit.

III.

In summary, the judgment is affirmed in part, vacated in part and remanded. On remand, the sole issues are whether the assessment for 1982 was valid and whether the IRS provided notice of intent to levy, along with the damage-claim issues that are contingent upon those findings.

Affirmed in part, vacated in part and remanded.

APPENDIX C - 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2192 DAVID AND ANN MARIE NIEMELA,
Plaintiff, Appellants,

v.

UNITED STATES OF AMERICA
Defendant, Appellee.

ORDER OF COURT

Entered July 1, 1993

Upon consideration of appellants' petition for rehearing, It is ordered that the petition for rehearing be denied.

By the Court:

FRANCIS P. SCIGLIANO ,CLERK.
FRANCIS P. SCIGLIANO
(Messrs. Niemela & Pappalardo)

FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counter claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make and order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the

trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.